

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Rate Appeal of Surf
and Sand Nursing Home, Inc.,
Appellant,

vs.

Minnesota Department of Human
Services,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-captioned matter came on for hearing before Administrative Law Judge Phyllis A. Reha on September 9, 1996, at the Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota.

Peter B. Hofrenning, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared on behalf of the Minnesota Department of Human Services ("Department" or "DHS"). Bernard C. Buchanan, President of Surf and Sand, Inc., 1910 Pheasant Drive, Harlingen, Texas 78550, appeared on behalf of the Appellant. The record in this matter closed on October 4, 1996 upon receipt of the parties last filed brief.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of Human Services shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with David Doth , Commissioner of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155.

STATEMENT OF ISSUE

The issues presented in this contested case are twofold:

1). Can the Department disallow employee salary allocations based solely on the lack of a time distribution study pursuant to Minn. Rule 9549.0030, subp. 3(B)?

2) Did the Appellant provide an accurate estimate of employee duties from which salary allocations were made on Appellant's cost reports; and if so, were such estimates statistically valid?

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Appellant, Surf and Sand Nursing Home, Inc. operated an intermediate care facility (ICF) in Minnesota under the name of Surf and Sand Nursing Home. Appellant acquired the facility operation and management on August 3, 1991 and subsequently sold that ownership interest on February 1, 1995. Under the state's successor liability law, Minn. Stat. §256B.0641, subd. 2, Appellant has become liable for the Department's request for rate over-payment for all rate periods beginning July 1, 1988 through June 30, 1992. The facility is a 56 bed free-standing nursing home in Duluth, Minnesota, and participated in the Medical Assistance program as established by Chapter 256B of Minnesota Statutes.

2. Appellant submitted cost reports to the Department for the rate years of 1988, 1989, 1990, 1991, and 1992. In these cost reports, Appellant claimed the salary cost for Gwen Schoen as 25% allocable to bookkeeping and 75% allocable to medical records. Index of Exhibits, Exhibit 2, M-6-2. Appellant claimed the salary costs for Diane Buchanan as allocable 25% to dietary department head, laundry department head, housekeeping department head, and social worker. *Id.* These allocations were done by Appellant's bookkeeper.

3. The Department conducted a field audit of the cost reports filed by Surf and Sand Nursing Home. The field auditor inquired of Gwen Schoen as to what duties she performed. *Id.* Schoen replied that she "prepared payroll, coded and paid invoices and other general bookkeeping duties. She also stated she did disease indexing, closing out old patient records and copying of patient records. *Id.* Since Buchanan was not available for an interview with the field auditor, he directed questions on Buchanan's duties to Schoen. Schoen described Buchanan's duties as some social work, ordering food and supplies, and performing duties as assigned by the administrator. *Id.*

4. Based upon the interview with Schoen, the staffing levels of other positions at the facility, and the lack of "time and attendance records and a time study" Buchanan's salary was recommended to be disallowed for reporting years 1988 through 1991. Index of Exhibits, Exhibit 2, M-6-3. The field auditor noted that reinstatement of Buchanan's salary, if done, should be to the clerical and bookkeeping category. *Id.* at M-6-3. The field auditor recommended reallocation of Schoen's entire salary to clerical, based on the "lack of time studies and 25% of Gwen's salary reported as the only bookkeeping or clerical payroll this facility had" *Id.* at M-6-2. The field auditor did not clarify whether the "only clerical payroll" determination was made before or after the assessment of Buchanan's duties.

5. A separate field audit report was prepared for reporting year 1991. In that report, Buchanan's salary was disallowed for failure to provide "attendance or equivalent records." Index of Exhibits, Exhibit 3, A-3, paragraph 18. Schoen's salary was reclassified due to the lack of "time distribution records." *Id.* at paragraph 19.

6. The Department disallowed and reclassified the salaries of Buchanan and Schoen, as recommended by the field auditor. An appeal was taken from these actions by Appellant. The Department upheld the reclassification of Schoen's salary from medical costs to general and administrative costs due to a lack of "time distribution records." Index of Exhibits, Exhibit 1, at 7. The Department upheld the reclassification of Buchanan's salary from dietary department head, laundry department head, housekeeping department head, and social worker to general and administrative costs due to a lack of time distribution records. *Id.* at 8.

7. As part of the appeal process, Schoen identified the duties she performed for Appellant and assigned percentages of time she estimated she spent on the function areas. Facility Exhibit 1. Schoen estimated she spent 65% of her time on administrative work, 25% on medical records, and 10% on social services.

8. Buchanan identified the duties she performed for Appellant and assigned percentages to each area. Facility Exhibit 2. Buchanan estimated that 55% of her time was spent on administrative work, 40% as total dietary time, and 5% social service work. *Id.* Buchanan's job description specifies that equal time is to be spent on the dietary, laundry, housekeeping, and social work areas. *Id.* In her resume, Buchanan identified "work directly under the Administrator," "Dietary," "Department Head Social Services, Housekeeping, and Laundry," "Bookkeeping," "Payroll Manager," and "Loss Control Coordinator" [*sic*] as duties of her position with Appellant. Facility Exhibit 2.

9. The Department's reclassifications were appealed on January 3, 1995, under Minn. Stat. § 256B.50 to the Office of Administrative Hearings. This matter came on for hearing pursuant to a Notice of and Order for Hearing and Prehearing Conference issued by Deputy Commissioner of Human Services John Petraborg on October 4, 1995.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.57-14.62 and Minn. Stat. § 256B.50.

2. The Notice of Hearing was proper and all substantive and procedural requirements of law and rule have been fulfilled.

3. To qualify for reimbursement where a salary is apportioned between cost areas, the reported costs must meet the requirements of Minn. Rule 9549.0030, subp. 3, which states:

When a person other than top management personnel has multiple duties, the person's salary cost must be allocated to the cost categories on the basis of time distribution records that show actual time spent or **an accurate estimate of time spent on various activities**. In a nursing facility of 60 or fewer beds, part of the salary or salaries of top management personnel may be allocated to other cost categories to the extent justified in time distribution records which show the actual time spent, or an accurate estimate of time spent on various activities. **A nursing facility that chooses to estimate time spent must use a statistically valid method.** Persons who serve in a dual capacity, including those who have only nominal top management responsibilities, shall directly identify their salaries to the appropriate cost categories. The salary of any person having more than nominal top management responsibilities must not be allocated. (Emphasis added).

4. Gwen Schoen has provided an accurate estimate of time she spent in each cost area to which her salary was allocated on Appellant's cost reports.

5. Diane Buchanan has not provided an accurate estimate of time she spent in each cost area to which her salary was allocated on Appellant's cost reports.

6. Interpreting the rule language "must use a statistically valid method" to require a time study constitutes an unpromulgated rule.

7. The estimate provided by Gwen Schoen of time spent in each cost area is statistically valid within the meaning of Minn. Rule 9549.0030, subp. 3.

8. The estimate provided by Diane Buchanan of time spent in each cost area is not statistically valid within the meaning of Minn. Rule 9549.0030, subp. 3.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

1. That the reclassification of Diane Buchanan's salary in the rate years 1988 through 1992 be AFFIRMED.

2. That the reclassification of Gwen Schoen's salary in the rate years 1988 through 1992 be modified to classify 25% of her salary to medical records and 10% of her salary over those rate years to the other care related services.

Dated this _____ day of November, 1996.

PHYLLIS A. REHA
Administrative Law Judge

Reported: Taped (two tapes)
No Transcript Prepared

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Appellant has introduced the testimony and affidavits of two nursing home employees to support the estimates of time they prepared to allocate their salaries between cost categories. The testimony by Gwen Schoen was credible and consistent with prior descriptions of her job duties. The percentages of time spent are based on the actual time worked in each cost area, as estimated by that employee. The testimony by Diane Buchanan as to the time Buchanan spent on job duties is inconsistent with the listed job duties of her position. Buchanan's testimony was inconsistent with her resume listing of job duties for Appellant. The evidence presented at the hearing supports the conclusion that the estimates of percentages for allocating Schoen's salary are accurate and the estimates for Buchanan's salary allocation are not accurate.

The Department maintains that its reclassification of salaries must be upheld, because there are no time distribution records of work in each cost area by the two employees and no time studies performed of the employee's actual work performed from which to calculate the proper allocation. This issue was addressed in the Order Denying Appellant's Motion for Summary Disposition in this matter, but will be revisited here.

Appellant claimed as costs the salaries of Schoen and Buchanan on its cost reports with allocated percentages set by the facility accountant. There is no question that such allocations are improper under the rules adopted by the Department. The proper method of allocation is set out in Minn. Rule 9549.0030, subp. 3 which states in pertinent part:

When a person . . . has multiple duties, the person's salary cost must be allocated to the cost categories on the basis of time distribution records that show actual time spent **or an accurate estimate of time spent on various activities. . . . A nursing facility that chooses to estimate time spent must use a statistically valid method.** (Emphasis added).

Appellant has relied upon estimates of time to support the allocation of cost claimed between cost areas. The Department argues that the rule requires "a

statistically valid method” and an employee estimate of time is not a such a method. There is no definition of “statistically valid” in the reimbursement statute or rules. The Department has introduced no expert testimony as to what constitutes statistical validity.

The Department supports its contention regarding statistical validity with the testimony of Charles Osell, Management Analyst in the Long Term Care Division of the Department. Osell indicated that the Department’s “policy” was to require a time study when a facility estimated cost allocations for salary in order to provide an audit trail. Osell Testimony. Osell did not indicate what would qualify as an acceptable time study or under what circumstances such a study would or would not be accepted as proof of proper allocation of salary between cost areas.

In the rulemaking for Minn. Rule 9549.0030, subp. 3, the final language was proposed in response to objections by commentators. There was no reference to “statistically valid method” in the Statement of Need and Reasonableness for the rule. The Report of Administrative Law Judge Jon Lunde discussed the finally proposed language as follows:

Under this rule, a nursing home is not required to maintain detailed logs showing how a person with multiple duties has spent his time in the various departments. It may maintain such records, **but it may also use any other method showing the actual time spent or providing an accurate estimate of the time spent in the various cost categories.** Sampling methods can be used as long as the sample produces an accurate estimate of the time the individual spends in the various activities.

* * *

The rule, as amended, is necessary and reasonable and the amendments do not constitute substantial changes for the purposes of Minn.Admin.R. 1400.1100. **They simply allow the allocation of salaries of persons with multiple duties based on accurate estimates.** (Emphasis Added)

In the Matter of the Proposed Adoption of Department of Human Services Rule Governing Payment Rates for Nursing Homes, OAH Docket No. HS-85-036-JL, at 24 (Report issued May 7, 1985)(emphasis added).

The Department argues that Judge Lunde’s comments mean that a facility can use “any method” to show actual time spent, rather than to estimate time. Department Post-hearing Brief, at 5 (footnote 3). This is a strained reading that is inconsistent with the findings in that rulemaking. The analysis of the rule by Judge Lunde indicates that taking a sample and extrapolating from the sample is a suitable method for estimating the salary to be allocated to each cost area. In this matter, no sample is taken. The testimony of each employee constitutes an estimate of the entire time appropriate to be allocated to each cost area.

The Department criticizes the employee estimates as “guesses” and maintains that only through a time study can an accurate estimate be made. This assertion is both unsupported in the record and factually incorrect. There are no standards in the rule for what constitutes an appropriate time study. Opinions can differ as to whether a particular measurement is “statistically valid.”^[1] Time studies are as capable of producing inaccurate results as any employee estimate of time spent in different work areas.^[2] For example, where a time study of an employee’s work throughout the entire month of October in a rate year shows 90% of that employee’s work is done in housekeeping and 10% is done in clerical, an extrapolation of that time study would allocate 90% of that employee’s salary to housekeeping and 10% to clerical throughout the year. If, however, the employee’s job duties changed after October so that only 40% for the remainder of the rate year was spent in housekeeping and the remaining 60% was spent in clerical, an accurate estimate would result in something close to 43% housekeeping and 57% in clerical. The rule lacks any standards to indicate when a time study is not “statistically valid.”

Schoen did not base the change in her job duties over time on a hypothetical situation. It was based on her own estimate of her actual experience over the entire length of her employment. Her testimony shows that she spent more time doing medical record duties later in her employment with Appellant. If a time study had been conducted during the early part of her employment and then extrapolated over the entire length of her employment, the time study would not have accurately estimated the time she actually spent performing medical record duties. Therefore, Schoen’s estimate of time spent doing medical records for the Appellant is more accurate than a time study performed over a short period of time could be. The only way in which a time study would accurately estimate the allocation of work done by Schoen, other than by chance, would be to conduct a time study before and after the increase in turnover in patient population and then weight each period to conform the percentages used to allocate her salary throughout the entire period for which costs were claimed by Appellant. There is nothing in Rule 50 to require such precision from a time study.

During the field audit, the Department used employee estimates of work performed to determine if the salary allocation by Appellant was facially accurate. Under the Department’s interpretation of the rule, had the salary allocations been supported by an inaccurate estimate derived from a “statistically valid” time study, the Department would be required to accept the inaccurate estimate. This outcome conflicts with the express requirement that the estimate be “accurate.” This is an absurd result arising from the Department’s overly restrictive reading of its rule. If the Department is able to reject an extrapolation as inaccurate based on employee estimates, the Department must also accept the possibility that an employee estimate can be accurate, for the purposes of the rule.

The fundamental flaw in the rule arises from the lack of any standards to define what is actually required in estimating time for allocation of time between job areas. The potential for problems in the application of the rule was foreseen by Judge Lunde when he analyzed a similar provision in these rules. Judge Lunde stated:

However, the Department should consider making a further clarification. At the time of a desk audit, or later field audit, **if the Department is not persuaded that the method used constitutes an accurate estimate, it may disallow the allocation of salaries claimed by the nursing home and make adjustments which could conceivably [sic] result in the disallowance of some costs. At that point, its actions would be retroactive in nature and the nursing homes may not have alternative evidence or records to verify the allocations claimed. For that reason, the Department should consider more specific language creating a minimum standard for determining what is an “accurate estimate”.** The rule could state that a statistical sample yielding reasonably reliable estimates, time studies conducted by an independent agency, or figures extrapolated from time records for a certain minimum number of days throughout the calendar year are acceptable.

ALJ Report, at 29 (emphasis added).

The language suggested by Judge Lunde addresses the potential problem of inaccurate estimates by use of measures reasonably related to arriving at an accurate result. One option is outcome-based by requiring a sample “yielding reasonably reliable estimates.” If a time study is conducted by an independent agency, there is a measure of reliability arising from the need to maintain credibility to continue offering the service. Specifying a minimum number of days “throughout the calendar year” would eliminate the problem of shifting job duties by providing a truly representative sample. The suggested language would have replaced the potential conflict between an accurate estimate and a statistically valid method with a definition. Meet the definition, and the costs are accurately estimated. Instead, none of these suggestions were adopted by the Department. The only change made in response to Judge Lunde’s suggestions was to require a “statistically valid method.” But the rule does not provide any standards as to what constitutes an “accurate estimate” or a “statistically valid method”, and leaves open the possibility for conflict. The rule provides no clear explanation of what “accurate estimate” the Department will accept.

Judge Lunde’s analysis also contains language of relevance to the Appellant’s position in this matter. “Alternative evidence **or** records” are cited as what could be lacking for a provider after a disallowance by the Department. ALJ Report, at 29 (emphasis added). Testimony by the employee as to her own work is alternative evidence. Appellant has provided alternative evidence of estimates for the allocation of salaries for the two affected employees.

In this matter, the Department is not convinced that Appellant has properly estimated time. No records exist to verify the claimed allocation. Evidence is available from the employees themselves as to the time spent working in each area. The Department asserts that this evidence is not acceptable, since the rule requirement of a “statistically valid method” actually means a time study. Since the rule lacks an express requirement for a time study, one can only be required if the time study is a valid interpretation of the rule. To impose such a requirement otherwise is to engage in

rulemaking outside the process set forth in the Minnesota Administrative Procedures Act (Minn. Stat. Chap. 14). As the Minnesota Supreme Court has stated:

The challenged practice is clearly within the statutory definition of a "rule":
"[E]very agency statement of general applicability and future effect, including the amendment, suspension or repeal thereof, made to implement or make specific the law enforced or administered by it or to govern its organization or procedure." Minn.Stat. Sec. 15.0411, subd. 3 (1980). Rules must be adopted in accordance with specific notice and comment procedures established by statute, Minn.Stat. Sec. 15.0412 (1980), and the failure to comply with necessary procedures results in invalidity of the rule. Johnson Brothers Wholesale Liquor Co. v. Novak, 295 N.W.2d 238 (Minn.1980).

White Bear Lake Care Center v. Minnesota Department of Public Welfare, 319 N.W.2d 7, at 8-9 (Minn. 1982)

The standards for measuring appropriate interpretation are set out in Cable Communications Board v. Nor-West Cable Communication Partnership, 356 N.W.2d 658 (Minn. 1984). An agency interpretation must be consistent with the regulatory scheme. *Id.* at 668. The Department's interpretation of the rule could result in preventing the use of an accurate estimate to allocate costs. Requiring a time study without setting standards for such a study could result in requiring an inaccurate estimate be used to allocate salary. This is a conflict between the Department's interpretation and the language of the rule. An example of such conflict is present in this matter. Schoen testified as to the changes in her job duties as the turnover in patient population increased due to patients getting better. Schoen's testimony clarified that her time estimates accounted for the difference in her job duties over time. Since the rule expressly requires an "accurate estimate" and does not define what calculation must be used, the employee's testimony is admissible to prove what percentages should be allocated to each category.^[3] The Department's approach is not consistent with the rule and does not constitute a permissible interpretation of that rule.

While the Department's requirement of a time study is impermissible, that does not end the inquiry. The rule does require that any estimate be "statistically valid." In the earlier Order in this matter, the Judge raised the possibility that:

[T]aking a sample of 100 percent of the employees for whom salaries are allocated and 100 percent of the time over which the allocations are to be made is a "statistically valid method" for estimating time. As the record presently stands there is no evidence that the employee's time estimates do not meet the accurate estimate requirement of Minn. Rule 9549.0030, subp. 3.

Order Denying Appellant's Motion for Summary Disposition, at 9 (Order issued June 21, 1996).

Had Schoen's testimony been that she could only remember part of her work experience and she was extrapolating from that portion, the statistical validity of her method of estimating would be a serious issue. Judge Lunde's Report specifically allows "sampling methods" so long as "the **sample** produces an accurate estimate of time the individual spends in various activities." ALJ Report, at 24 (emphasis added). Here, the sample is the entire time Schoen worked in the years reported. The estimate is only to the allocation of that employee's salary. There is no extrapolation required in the estimate and therefore, there is no possibility of statistical error through variation between the sample and the entire range of data from which the sample is drawn. The accuracy of the estimate is not dependent on any principle of statistical analysis, but rather on the testimony of the employee who performed the work. The Department has introduced no evidence to suggest that the employee's method of estimation is in some fashion not "statistically valid."

The Department expressed concern over being able to effectively audit estimates of employee salary allocation. A natural tendency would be to allocate more time to cost areas without limits and less time to cost areas where reimbursement is capped. The record in this matter demonstrates that there are numerous methods to detect inaccurate estimates. As discussed in the foregoing paragraphs, those methods must be available to the Department if time studies that result in inaccurate estimates are to be challenged. Applying those methods in this matter has resulted in the conclusion that the estimate for Buchanan's salary allocation is inaccurate. The Department's audit requirements do not justify adopting unpromulgated rules.

Appellant has asserted that the Department has previously accepted employee estimates to determine proper allocation of salary in the absence of time studies. The evidence offered for that proposition was part of a settlement agreement between the Department and another provider, which, by its terms, is not precedent for this or any other matter. The Administrative Law Judge has not relied upon that settlement in arriving at the Conclusions in this Report.

At the hearing, the Department criticized Schoen's estimate of time as inaccurate, based on Schoen's inclusion of minute taking in the category of medical records and inclusion of assisting social service personnel with admissions paperwork as social services. Department Brief, at 3. Osell testified that such duties should have been classified as general and administrative costs. No basis for such a reclassification was offered other than the Osell's testimony. The record does not show by a preponderance of the evidence that the duties identified by Schoen fall outside the categories claimed. When estimates are provided to support costs, some inaccuracy is inherent in the cost claimed. There is no evidence in the record that Schoen's estimates included significant amounts of the time claimed for those duties (even if they had been shown to be outside the claimed categories). The inclusion of some unknown amount of time for duties, asserted to be improperly classified, is insufficient to justify disallowing the entire estimate. Since the Department does not require time records, the Department cannot rely upon a theory of disallowance that would, in essence, require time records to refute.

Appellant has shown that the estimate by Schoen of work done in cost areas is accurate. Under Minn. Rule 9549.0030, subp. 3, a facility may accurately estimate its salary allocation, so long as the method used is statistically valid. There is nothing in the record to show that the method used by Appellant is not statistically valid. The Department's interpretation of its rule to require a time study be performed is inconsistent with the rule and constitutes an unpromulgated rule. Appellant has not shown its estimate by Buchanan of work done is accurate. Therefore, the Administrative Law Judge recommends that the costs claimed for Schoen be reclassified to reflect 25% of her salary allocable to the medical records area and 10% of her salary allocable to other care related services. The Administrative Law Judge recommends that the request for reallocation of Buchanan's salary be denied.

P.A.R.

STATE OF MINNESOTA)

) SS

COUNTY OF HENNEPIN)

AFFIDAVIT OF SERVICE BY U.S. MAIL

LaVon Regan, being first duly sworn, hereby deposes and says that on the ____ of February, 1996, at the City of Minneapolis, county and state aforementioned, she served the attached ORDER OF THE ADMINISTRATIVE LAW JUDGE GRANTING DEPARTMENT'S MOTION AND DENYING APPELLANT'S MOTION FOR SUMMARY DISPOSITION; Docket No. 11-1800- ____-2, by depositing in the United States mail at said City of Minneapolis, a true and correct copy thereof, properly enveloped, with first class postage prepaid and addressed to the individuals named herein.

Assistant Attorneys General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127

445 Minnesota Street, Suite 700
St. Paul, MN 55101

LaVon Regan

Subscribed and sworn to before me
this _____ day of February, 1996.

Notary Public

^[1] In In the Matter of Proposed Amendments to Permanent Rules Governing Waste Combustor Permits and Standards of Performance for Waste Combustors, OAH Docket No. 69-2200-8223-1 (Report issued February 11, 1994), the question of statistical validity was addressed as follows:

The MPCA's basis for banning these combustors was challenged by Marshall Nelson, insofar as the two new incinerators that Marshall Nelson has tested in the past eighteen months meet the proposed emissions limits. The three older combustors tested by the MPCA failed the proposed limits. Marshall Nelson maintains its test of two incinerators is more "statistically valid" than the MPCA's test.

Neither the MPCA test nor Marshall Nelson's test are statistically valid, because neither is a random sampling and both the sample sizes are too small. The MPCA chose three existing incinerators in good condition following proper incineration procedures to determine if the run of the mill Class IV combustor could meet the proposed emission standards. Marshall Nelson's test was limited to new combustors it had installed. Those combustors are not representative of the 1,300 existing Class IV combustors in Minnesota.

^[2] Regarding a time study prepared to analyze work time spent on tasks in railroad stations, an Administrative Law Judge found:

The unit time study is based on statistics prepared in 1974 and 1975 by studying agents' work at other stations in Minnesota. The averages used in this study are, therefore, not necessarily precise with regard to the time actually spent at Kelly Lake. Nonetheless, for purposes of their use in this proceeding, they are adequately accurate.

In the Matter of the Application of Burlington Northern Railroad Company for Authority to Transfer Agency Service for the Kelly Lake, Minnesota Agency to Burlington Northern Railroad Company's Centralized Service Agency at Superior, Wisconsin, OAH Docket No. 6-3001-8383-94 (Recommendation issued February 4, 1994)(*nota bene*, the study appeared to overstate the work performed, which was adverse to the study proponent's position).

^[3] Were this matter presented in a different posture, the same testimony could be used to impeach a time study that did not result in an accurate estimate. The testimony would establish the proper allocation for the time spent in each work area. As mentioned earlier, in this matter the field auditor used statements by the employee to support the initial reclassification.